

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAS VEGAS SUN, INC.,

Plaintiff,

v.

SHELDON ADELSON, *et al.*,

Defendants.

Case No. 2:19-cv-01667-ART-MDC

ORDER

LAS VEGAS REVIEW-JOURNAL, INC.,

Counter Claimant,

v.

LAS VEGAS SUN, INC., *et al.*,

Counter Defendants.

Plaintiff Las Vegas Sun, Inc. brings this action against Defendants Sheldon Adelson, Patrick Dumont, News+Media Capital Group LLC, and Las Vegas Review-Journal, Inc (collectively, “the RJ”). The RJ brings counterclaims against Las Vegas Sun, Inc.; Brian Greenspun; and Greenspun Media Group, LLC (collectively, “the Sun”). At its core, this is an antitrust action between media companies.

Before the Court are two objections (ECF Nos. 752, 819) by the RJ to orders by Magistrate Judge Cam Ferenbach. One order (ECF No. 742) upholds a special master decision (ECF No. 713) to impose protective orders barring discovery of certain evidence. The other order (ECF No. 818) upholds a special master decision (ECF No. 805) to allow the Sun to rely on “the Stephens Letter of Intent” in its calculation of damages. The RJ has filed a motion for leave to file a reply in support of its objection to the former order, which is also before the Court. (ECF No. 772.) Finally, before the Court is a motion to exclude the testimony of the RJ’s expert witness, Kenneth Paulson. (ECF No. 898.) For the reasons identified

1 below, the Court grants the RJ's motion to file reply, overrules its objections to
2 both orders by Judge Ferenbach, and grants in part and denies in part the Sun's
3 motion to exclude the testimony of Kenneth Paulson.

4 **I. BACKGROUND**

5 Parties are daily print newspapers in Clark County, and related entities.
6 They bring antitrust and breach of contract claims against one another.

7 This ruling assumes familiarity with the facts, as described in the Court's
8 prior orders. Each order, objection, and motion relevant to this order is discussed
9 in greater detail below.

10 **II. DISCUSSION**

11 **A. The RJ's Objections**

12 The RJ objects to two orders by Magistrate Judge Ferenbach: a protective
13 order barring discovery of certain evidence and an order allowing the Sun to rely
14 on a particular piece of evidence, the "Stephens Letter of Intent" (LoI) in
15 calculating its damages in this action.

16 A district judge reviews a magistrate judge's decisions on non-dispositive
17 issues under a "clearly erroneous or contrary to law" standard. *Bhan v. NME*
18 *Hospitals, Inc.*, 929 F.2d 2404, 1414 (9th Cir. 1991); 28 U.S.C. § 636(b)(1)(A); Fed.
19 R. Civ. P. 72(a); LR IB 3-1(a). Rulings made on discovery, including sanctions, are
20 generally non-dispositive and subject to this standard. *See Bhan*, 929 F.2d at
21 1414 (citations omitted). The "clearly erroneous" standard is deferential,
22 requiring a "definite and firm conviction that a mistake has been committed."
23 *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citation omitted). In contrast, the
24 "contrary to law standard permits independent review of purely legal
25 determinations by the magistrate judge." *Green v. Baca*, 219 F.R.D. 485, 489
26 (C.D. Cal. 2003).

27 The Court finds that Judge Ferenbach's challenged orders (ECF Nos. 742,
28 818) were neither clearly erroneous nor contrary to law.

1. THE PROTECTIVE ORDER

The RJ objects to protective orders barring it from seeking discovery on four categories of evidence: (1) “the Greenspun Family Agreement” (Topics 4 and 33); (2) the operations of Greenspun Media Group’s non-Sun publications (Topics 28-31); (3) damages to the LasVegasSun.com brand (Topic 24); and (4) the Sun’s shareholder distributions, the disposition of settlement proceeds obtained from Stephens Media, and the disposition of the 2019 judgment against the RJ (Topics 21 and 25).

Judge Ferenbach upheld these orders, which were originally issued by Special Master Pro, because he found that each category of evidence was irrelevant, that discovery would be disproportionate to the needs of the case, or both. *See* Fed. R. Civ. P. 26(b)(1). The Court has reviewed the evidence before it and considered the RJ’s proposed reply (ECF No. 772-1.) The Court concludes that Judge Ferenbach did not clearly err in reaching any challenged decision. It therefore grants the RJ’s motion to submit a reply (ECF No. 772) and overrules its objection to Judge Ferenbach’s order (ECF No. 752).

Parties are entitled to obtain discovery under Federal Rule of Civil Procedure 26(b) “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).

Federal Rule of Civil Procedure 26(c) allows the Court to issue a protective order if the party seeking the order establishes “good cause” and the protective order is required “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1). “The party

1 seeking protection bears the burden of showing specific prejudice or harm will
2 result if no protective order is granted.” *Phillips v. Gen. Motors Corp.*, 307 F.3d
3 1206, 1210–11 (9th Cir. 2002).

4 The Court reviews Judge Ferenbach’s decision on each category of
5 discovery below.

6 **a. The Greenspun Family Agreement (Topics 4 and 33)**

7 Judge Ferenbach’s protective order on Topics 4 and 33 prohibits discovery
8 on prior efforts to sell the Sun (Topic 33) and the Greenspun Family Global
9 Agreement (GFGA) (Topic 4), which was an agreement between Greenspun family
10 members to transfer ownership interests in the Sun and several other companies.
11 He found that these topics were irrelevant and otherwise disproportionate to the
12 needs of the case based on “considerations of time, costs and proportionality.”
13 (ECF No. 742 at 4.) The RJ objects that Topics 4 and 33 are relevant to calculating
14 the Sun’s damages and argues that discovery would not be disproportionate
15 because it would be limited to four hours on a relatively simple issue. (ECF No.
16 752 at 14-17.)

17 Judge Ferenbach did not clearly err in upholding the protective order on
18 these topics. Judge Ferenbach and Special Master Pro both determined that the
19 GFGA was irrelevant after an *in camera* review of its terms. (*See id.*) Those terms
20 apparently contemplate the sale of 28 companies, none of which are separately
21 valued. (*See* ECF Nos. 479, 565, 619, 742.) It seems unlikely that discovery on
22 this issue could yield useful information on the value of the Sun.

23 While the Court has permitted testimony on the Stephens LoI, *see infra*,
24 the relevance of that document has no bearing on the relevance of the GFGA,
25 which is a separate document dealing with a separate issue.

26 Given the above considerations, and the considerations of time, cost, and
27 proportionality, it was not clear error to determine that discovery on these issues
28 was either irrelevant or disproportional.

1 The Court overrules the RJ's objection to this portion of Judge Ferenbach's
2 order.

3 **b. The GMG's Non-Sun Publications (Topics 28-31)**

4 Judge Ferenbach's protective order on Topics 28-31 prohibits discovery
5 into the advertising sales, circulation, readership, targeted audiences, and
6 printing operations of the Greenspun Media Group ("GMG")'s non-Sun
7 publications. (See ECF No. 752 at 5.) Judge Ferenbach found that these topics
8 were "non-discoverable, irrelevant, and disproportional." (ECF No. 742 at 5.) He
9 reached his irrelevance conclusion, in part, by identifying the relevant market
10 and concluding that GMG's non-Sun publications were not competitors in that
11 market.

12 The RJ objects that the definition of the relevant market is a contested
13 issue, and Judge Ferenbach does have the power to define the market at this
14 stage in the litigation. It further argues that information about GMG's non-Sun
15 printing, distributing, and advertising processes is relevant not only to the scope
16 of the market but also to the existence of barriers to entry in that market. (ECF
17 No. 752 at 8-13.) Finally, it argues that discovery would not be disproportionate
18 because the topics at issue are highly relevant to the dispute, and they are not
19 complex.

20 The scope of the relevant market "is a question of fact for the jury." *Theme*
21 *Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1002 (9th Cir. 2008). The
22 Court cannot definitively identify the relevant market at this stage in the
23 litigation. But parties to antitrust litigation do not have unrestrained power to
24 discover any potentially market-related fact. *See, e.g., Mfg. Research Corp. v.*
25 *Greenlee Tool Co.*, 693 F.2d 1037, 1042-43 (11th Cir. 1982) (affirming denial of
26 discovery of defendant's conduit bender sales where the relevant product market
27 was cable bender market); *Neumann v. Vidal*, 1981 U.S. Dist. LEXIS 17689
28 (D.D.C. 1981) (limiting discovery to wall building on U.S. highways and road

1 projects after the court preliminarily determined that was the relevant market).
2 Discovery may be limited by the scope of the market, as defined in the complaint.
3 *See Bal Seal Engineering, Inc. v. Nelson Products, Inc.*, Case No. 8:13-cv-01880-
4 JLS-KESx, 2017 WL 10311212, at *2 (C.D. Cal. 2017) (“How the relevant market
5 is defined determines the scope of the discovery . . .”).

6 The Sun’s complaint proposes a relevant market, and the RJ does not
7 propose an alternative. (See ECF No. 296 at 48 ¶ 106.) In fact, the RJ adopts the
8 Sun’s market definition for its own antitrust claims against the Sun. (*Id.* at ¶
9 107.) With regard to challenging the Sun’s market, the RJ merely lists products
10 that might also compete with the Sun/RJ paper. (*Id.* at ¶ 106 (suggesting that
11 the relevant market could include “internet news websites, mobile news apps,
12 local TV news, cable TV news, radio stations, and satellite radio”).)

13 The RJ cannot discover information on all potential products merely by
14 disagreeing with the Sun’s definition of the relevant market. Rather, its discovery
15 is limited by the market pled by the Sun. *See Bal Seal Engineering*, 2017 WL
16 10311212, at *2. Judge Ferenbach did not clearly err in determining that
17 discovery into the wide range of other publications owned by the GMG was
18 irrelevant to weighing the legitimacy of the Sun’s alleged market.

19 Further, because the existence of barriers to entry is defined by the scope
20 of the relevant market, *see, e.g., Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51
21 F.3d 1421, 1439 (9th Cir. 1995) (holding that the existence of barriers to entry
22 *into the relevant market* is relevant to a court’s market power analysis in an
23 antitrust proceeding), Judge Ferenbach did not clearly err in finding that
24 discovery on Topics 28-30 was irrelevant in light of the pled market. (See ECF No.
25 752 at 8-13 (arguing that Topics 28-30 are relevant because they could
26 demonstrate low barriers to entry in the relevant market).)

27 Relevance aside, Judge Ferenbach did not clearly err in concluding that
28 discovery related to GMG’s non-Sun publications would be disproportional to the

1 needs of the case. Imposing extensive discovery on the operations of publications
2 that are not involved in this litigation, including discovery into sales, circulation,
3 readership, target audiences, and printing operations, would be unduly
4 burdensome and disproportionate.

5 The Court overrules the RJ's objection on this issue.

6 **c. Damages to the LasVegasSun.com Brand (Topic 24)**

7 The RJ also challenges the protective order barring discovery on damages
8 to the LasVegasSun.com brand and "[t]he extent to which GMG separates or
9 distinguishes the brand of the printed *Sun* versus the brand for
10 LasVegasSun.com" (Topic 24). Judge Ferenbach upheld the protective order
11 because he found damages to the website's brand to be irrelevant, since the Sun
12 only seeks damages to the printed *Sun*. The RJ objects that expanded discovery
13 is appropriate because the print *Sun* and LasVegasSun.com are the same brand,
14 with the same registered trademark, writers, and advertising staff.

15 Judge Ferenbach did not clearly err in finding evidence on the
16 LasVegasSun.com brand irrelevant. The Sun does not seek damages from harm
17 to its digital operations, and the Sun/RJ Joint Operating Arrangement ("JOA")
18 does not impose any obligations on the RJ related to Sun website. (See ECF No.
19 837-6.) It is not clear error to conclude that the Sun and the LasVegasSun.com
20 are separate brands and that discovery on the LasVegasSun.com is irrelevant in
21 light of these facts.

22 The RJ's objections on this issue are overruled.

23 **d. The Distributions (Topics 21 and 25)**

24 Finally, the RJ objects to Judge Ferenbach's orders prohibiting discovery
25 on Topics 21 and 25, which concern the distribution of a \$25 million payout to
26 Sun shareholders (Topic 21) and the distribution of proceeds from the Stephens
27 Media settlement and the 2019 arbitration judgment against the RJ (Topic 25).
28 Judge Ferenbach found that these topics were neither relevant nor proportional

1 because they occurred decades ago, before Brian Greenspun and GMG took
2 control of the Sun.

3 As for Topic 21, the RJ objects that there is no proof that the shareholder
4 distributions occurred decades ago, and the RJ should not be forced to rely on
5 the Sun's unsupported contentions about the date of the distributions. The RJ
6 further objects that all distributions are relevant to show alter-ego liability of
7 GMG and Brian Greenspun, since their use of money intended for the Sun would
8 demonstrate their alter ego status. Finally, the RJ objects that the above-
9 mentioned judgment distributions are relevant to show damages because, if the
10 money from the 2019 arbitration did not go to the Sun, that would undermine
11 the Sun's claim that it had been pushed to the brink of collapse by the RJ's
12 actions.

13 Judge Ferenbach did not clearly err in concluding that both topics were
14 irrelevant and disproportionate. As for the shareholder distributions (Topic 21),
15 GMG gave sworn testimony that there have been no shareholder distributions
16 since GMG became parent company of the Sun. (ECF No. 761-3 at 5:2-5; *see also*
17 ECF No. 462-2 at ¶ 6 (indicating that GMG and Greenspun took ownership of the
18 Sun at the same time).) Since the distribution occurred before Greenspun and
19 GMG took ownership, it cannot be relevant to the RJ's alter-ego claims.

20 As for the other distributions (Topic 25), it was not clear error to determine
21 that the distribution of the Stephens Media settlement and the 2019 judgment
22 was irrelevant to this case. Nor was it clear error to determine that discovery
23 related to both topics would be disproportionate to the needs of the case. Further,
24 granting an additional four hours to depose the Sun's 30(b)(6) witness, who has
25 already been deposed for seven hours, would be unduly burdensome. *See* Fed. R.
26 Civ. P. 30(d) (limiting depositions to "1 day of 7 hours" in most cases).

27 The RJ's objections on this issue are overruled.

28 **2. THE STEPHENS LETTER OF INTENT**

a. Background

Around the time the 2005 JOA was formed, the RJ entered into a separate Mark and Domain Name License Agreement with the Sun, the Greenspun Media Group (“GMG”), and Vegas.com LLC, in which the RJ allowed Vegas.com and GMG to use the URL lasvegas.com in exchange for a one-time fee and escalating monthly payments until 2040. (ECF No. 450-3 ¶ 54.) At that time, the Sun, GMG, and Vegas.com were each owned by members of the Greenspun family. (See ECF Nos. 819, 820 at 3-4.)

In or around June 2013, Stephens proposed an agreement with the Greenspun siblings which would terminate the 2005 JOA, assign lasvegas.com license rights to the Sun, grant Stephens rights to the Sun’s website, LasVegasSun.com, and require Stephens to pay the Greenspun siblings \$70,000 each. (ECF No. 450-3 ¶ 63). This agreement was formalized in a Letter of Intent between Stephens, the Sun, and TGC (as manager of GMG). This is the Letter of Intent at issue in Defendants’ Objection. Stephens and the Greenspun family never went through with the agreement, for reasons irrelevant to this order.

In 2020, while discovery in this case was underway, Magistrate Judge Brenda Weksler ordered the Sun to “identify each category of damages [it] currently seeks in this case, including its theory and computation of damages” by December 31, 2020. (ECF No. 275 at 16 (“the Weksler Order”).) The Weksler Order noted that the Sun was only required to comply as best it could, given the information currently available to it and stated that, if the sun intended to use expert testimony to create and apply a calculation method, it was free to disclose that calculation method alongside its expert disclosures (i.e., at a later date). *Id.* The Sun’s subsequent disclosure did not explicitly mention the LoI, but it did note that it was seeking damages based on a theory of “diminution of value.” (ECF No. 348-2 at 11.)

Later, on June 7, 2022, which was the last day of discovery, the Sun

1 disclosed that one of its experts, Dr. Russell L. Lamb, would rely on the Stephens
2 LoI in his damages calculation. (ECF Nos. 776-2, 778-2.) Specifically, Dr. Lamb
3 would use the Stephens LoI to infer the Sun's value in June 2013 and, by
4 comparing that inference to the Sun's current valuation, to conclude that the RJ
5 has been syphoning profits from the Sun.

6 The RJ then moved to preclude reliance on the Stephens LoI based on the
7 Sun's alleged failure to disclose its intention to rely on the Stephens LoI in
8 violation of both Fed. R. Civ. P. 26 and the Weksler Order. The RJ argued that
9 preclusion was appropriate under Fed. R. Civ. P. 37 and the doctrine of judicial
10 estoppel.

11 Special Master Pro found that the RJ was not entitled to Rule 37 sanctions
12 or estoppel. (ECF No. 805.) The RJ then appealed to Magistrate Judge Ferenbach,
13 who agreed with Special Master Pro, after reviewing the issue *de novo*. (ECF No.
14 818.)

15 The RJ now appeals to this Court, raising the same arguments it raised in
16 its original motion and in its objection to Special Master Pro's decision on that
17 motion.

18 **b. Rule 26 and the Weksler Order**

19 The RJ argues that Dr. Russell's testimony violates both Fed. R. Civ. P.
20 26(a)(1) and the Weksler Order, (ECF No. 275) and asks this Court to respond by
21 (1) issuing sanctions under Fed. R. Civ. P. 37 that bar admission of relevant parts
22 of Dr. Russell's Report or (2) ordering estoppel, similarly barring relevant sections
23 of the Report. The Court concludes that the Sun did not violate Rule 26 or the
24 Weksler order, and Judge Ferenbach did not clearly err in deciding that the RJ
25 was not entitled to Rule 37 sanctions or estoppel.

26 Rule 26 requires parties to disclose, "based on the information reasonably
27 available to [them]," Fed. R. Civ. P. 26(a)(1)(E), "a computation of each category
28 of damages" they will seek, *Hamilton v. Wal-Mart Stores, Inc.*, 29 F.4th 575, 590

(9th Cir. 2022) (citing Fed. R. Civ. P. 26(a)(1)(A)). The Weksler Order, similarly, required the Sun, by December 31, 2020, to “identify each category of damages [it] currently seeks in this case, including its theory and computation of damages.” (ECF No. 275 at 16.) The Weksler Order noted that the Sun was only required to comply as best it could, given the information currently available to it and stated that, if the sun intended to use expert testimony to create and apply a calculation method, it was free to disclose that calculation method alongside its expert disclosures (i.e., at a later date). *Id.*

Judge Ferenbach made two determinations that suggest that the Sun did not violate Rule 26 or the Weksler Order. Specifically, Judge Ferenbach found that (1) “the Sun has consistently maintained throughout these proceedings that the Stephens LOI is relevant to the issue of the value of the Sun and hence its damages”; (2) the Sun timely disclosed that it was seeking damages for diminution in value and that the Stephens LOI was a part of its diminution theory.

These determinations by Judge Ferenbach were not clearly erroneous. The Sun disclosed that it was seeking damages based on a theory of diminution of value in December 2020. (ECF No. 348-2 at 11.) It further disclosed that the LoI was relevant to that theory on several occasions. (*E.g.*, ECF No. 449 at 26 (explaining that the LoI was relevant to the Sun’s valuation and the RJ had access to the LoI); ECF No. 462 at 6 (explaining the same, in greater detail); ECF No. 793-2 at 85:16-86:4 (“there’s one major point, [to] which . . . [the LoI] is relevant . . . it would be for value”).) The RJ has even acknowledged the LoI’s relevance in other briefings. (ECF No. 704 at 7 (“[T]he Sun wants to rely on two prior contemplated sales of the Sun to support its damages—a 2017 offer from Defendants . . . [including] a 2013 offer from Stephens Media.”).) Contrary to the RJ’s arguments, the Sun never argued that the LoI was irrelevant to its calculation of damages, and no judge ever held it to be irrelevant for those

1 purposes.

2 Because the Sun repeatedly notified the RJ of the LoI's relevance to its
3 damages calculations, it was not clear error to conclude that the Sun had not
4 violated Rule 26, or if it had, that any violation was substantially justified or
5 harmless. Because the Sun notified Defendants of its "diminution of value" theory
6 of damages before the Weksler Order deadline, and because that Order (1)
7 required only disclosure of damages *theories*, (ECF No. 275 at 16), and (2) allowed
8 for the disclosure of expert calculation methods at a later date, *id.*, it was not
9 clear error to conclude that the Sun did not violate the Weksler Order.

10 If Judge Ferenebach did not clearly err in reaching the above conclusions,
11 he could not have erred in refusing to impose Rule 37 sanctions. A motion for
12 exclusionary sanctions under Rule 37 generally cannot be approved without a
13 showing that the non-moving party has violated its disclosure obligations under
14 Rule 26 or a court order. *See* Fed. R. Civ. P. 37 ("*If a party fails to make a*
15 *disclosure required by Rule 26(a), any other party may move . . . for appropriate*
16 *sanctions.*") (emphasis added); *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d
17 585, 589 (9th Cir. 1983) ("[Rule 37] authorizes the district court . . . to impose a
18 wide range of sanctions when a party fails to comply with the rules of discovery
19 or with court orders enforcing those rules.") (citations omitted). If the Sun did not
20 violate Rule 26 or the Weksler Order, or if any violation was minor, it was not
21 clear error to deny sanctions under Rule 37.

22 Nor did Judge Ferenbach err in refusing to estop the Sun's expert from
23 relying on the Stephens LoI. "Judicial estoppel generally [acts to prevent] a party
24 from prevailing in one phase of a case on an argument and then relying on a
25 contradictory argument to prevail in another phase." *Milton H. Greene Archives,*
26 *Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993 (9th Cir. 2012). As noted above,
27 the Sun never argued that the LoI was irrelevant for damages purposes. Both
28 Judge Ferenbach and Judge Pro agree on this point. (ECF No. 805 at 5 (the record

1 “strongly supports” the argument that “[t]he Sun . . . has consistently maintained
2 . . . that the Stephens LoI is relevant to the issue of the value of the Sun and
3 hence its damages”); ECF No. 818 at 3 (“The Sun consistently maintained
4 throughout these proceedings that the Stephens LoI is relevant to the issue of the
5 value of the Sun and hence its damages.”.) If the Sun never claimed that the LoI
6 was irrelevant, then estopping it from arguing that the LoI is relevant would be
7 inappropriate.

8 For the above reasons, the RJ’s objections to Judge Ferenbach’s order on
9 the Stephens LoI is overruled.

10 **B. Testimony of Kenneth Paulson**

11 The Sun seeks an order barring the expert testimony of Kenneth Paulson.
12 Mr. Paulson intends to testify on behalf of the RJ in support of its claims that the
13 Sun breached the cooperation and quality provisions of the 2005 JOA. The Sun
14 argues that Mr. Paulson’s testimony is inadmissible because it is unreliable
15 under *Daubert v. Merrill Dow Pharms Inc.* and invades the role of the jury by
16 offering improper legal opinion. 509 U.S. 579 (1993). The RJ seeks an order
17 excluding any aspect of Mr. Paulson’s testimony that relates to: (1) any of his
18 studies, including any comparison or count of the number of local news articles
19 on LasVegasSun.com; (2) interpretation of contractual provisions of the Amended
20 JOA; (3) whether the Sun breached any provision of the Amended JOA; and (4)
21 the Sun’s intent.

22 The Court agrees that some of Mr. Paulson’s proposed testimony is
23 improper. It therefore bars any aspect of Mr. Paulson’s testimony that (1)
24 interprets contractual provisions of the JOA; (2) provides a conclusion about
25 whether the Sun breached the JOA; or (3) interprets the Sun’s intent. It disagrees
26 about the reliability of Mr. Paulson’s testimony under *Daubert*, so it denies the
27 Sun’s motion as to that issue.

28 **1. Reliability and *Daubert***

1 The admissibility of expert testimony is governed by Federal Rule of
2 Evidence 702, which provides:

3 A witness who is qualified as an expert by knowledge, skill,
4 experience, training, or education may testify in the form of an
5 opinion or otherwise if: (a) the expert's scientific, technical, or other
6 specialized knowledge will help the trier of fact to understand the
7 evidence or to determine a fact in issue; (b) the testimony is based
on sufficient facts or data; (c) the testimony is the product of reliable
principles and methods; and (d) the expert has reliably applied the
principles and methods to the facts of the case.

8 Fed. R. Evid. 702. The party offering expert testimony bears the burden of proving
9 the testimony complies with Rule 702. *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d
10 594, 598 (9th Cir. 1996).

11 *Daubert v. Merrill Dow Pharms Inc.* gives the standard for determining
12 whether testimony is the product of reliable principles and methods under Fed.
13 R. Evid. 702(c). 509 U.S. at 593-95. Under that standard, courts may consider
14 the following factors, if applicable: "(1) whether the theory or technique employed
15 by the expert is generally accepted in the scientific community; (2) whether it's
16 been subjected to peer review and publication; (3) whether it can be and has been
17 tested; and (4) whether the known or potential rate of error is acceptable."
18 *Hardeman v. Monsanto Co.*, 997 F.3d 941, 960 (9th Cir. 2021) (internal quotation
19 marks omitted) (citing *Daubert*, 509 U.S. at 593-95). "This inquiry is flexible and
20 should be applied with a liberal thrust favoring admission." *Hardeman*, 997 F.3d
21 at 960 (internal quotation marks and citations omitted).

22 The Sun argues that Mr. Paulson's studies are not reliable because: (1) they
23 are based on insufficient factual evidence; (2) they unreasonably conflate the
24 printed *Sun* and LasVegasSun.com newsrooms; (3) they are based on an
25 unreliable and nonreplicable method; (4) they are not based on techniques which
26 are generally accepted in the scientific community; and (5) they cannot be used
27 to demonstrate reduction of output in the market to support the RJ's antitrust
28 claims. The Court addresses each of these issues below.

a. Sufficiency of Facts

The Sun first argues that Mr. Paulson’s testimony is based on insufficient facts because he failed to consider certain information in rendering his opinion. The information Mr. Paulson allegedly failed to consider includes the deposition testimony of certain witnesses, letters of support for the *Sun*, reader surveys and opinions on the *Sun*, and alternative explanations for the *Sun*’s alleged poor quality.

Expert testimony must be based on “sufficient facts or data” to be admissible. Fed. R. Evid. 702(b). In some cases, failure to consider crucial information may render an analysis “so incomplete as to be inadmissible as irrelevant.” *Hemmings v. Tidyman’s, Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002) (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 n.10 (1986)). But more typically, “failure to include variables will affect the analysis’ probativeness, not its admissibility.” *Hemmings*, 285 F.3d at 1188; *see also In re EPD Investment Co., LLC*, 587 B.R. 711, 720 (C.D. Cal. 2018) (holding an expert witness’s failure to consider a bankrupt entity’s tax returns and reliance on unaudited financial information did not render the report inadmissible).

Mr. Paulson’s testimony is based on a review of hundreds of editions of the printed *Sun* and representative samples from other peer newspapers. He performs largely quantitative analyses on factors including stories’ timeliness, proximity of focus, source (in-house or Associated Press copy), and age. (ECF No. 863-1 at 15.) And he applies these standards in the context of norms of the U.S. metropolitan daily news industry.

The Sun’s arguments effectively constitute a challenge to Mr. Paulson’s methodology. The Sun would rather Mr. Paulson consider more-qualitative factors like the printed *Sun*’s writing quality, its ethical standards, and its reputation. (ECF No. 898 at 19-20.) But “[d]isputes as to . . . faults in [an expert’s] use of a particular methodology . . . go to the weight, not the admissibility, of . .

1 . testimony.” *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1988). In
 2 any case, the Sun points to no source indicating that any of its proposed
 3 alternatives are necessary to the validity of Paulson’s report. If the Sun wishes to
 4 undermine the credibility of Mr. Paulson’s testimony or cast doubt on the
 5 reliability of his methods, it may do so at trial, before a jury. *See Hemmings*, 285
 6 F.3d 1174 (“Vigorous cross-examination of a study’s inadequacies allows the jury
 7 to appropriately weight the alleged defects and reduces the possibility of
 8 prejudice.”).

9 **b. Conflation of Sun and LasVegasSun.com Newsrooms**

10 The Sun next argues that Mr. Paulson’s opinions are not “the product of
 11 reliable principles and methods” and not “properly applied to the facts of the
 12 case,” because Mr. Paulson fails to consider crucial differences between the print
 13 Sun and LasVegasSun.com. Fed. R. Evid. 702(c)-(d).

14 Mr. Paulson compares stories from the Sun’s website and its printed paper
 15 and finds that only 23.9 percent of the staff-written stories on the website appear
 16 in the paper. To Paulson, this suggests that the Sun is keeping its best articles
 17 out of its paper, (ECF No. 863-1 at 21-22), but the Sun complains that Mr.
 18 Paulson fails to consider that LasVegasSun.com sources its stories from the
 19 staffs of many different GMG publications. According to the Sun, Mr. Paulson’s
 20 numbers are artificially inflated because many of the stories that he thinks
 21 should be in the Sun paper have no connection to the Sun at all.

22 The Sun’s arguments are insufficient for two reasons. First, the Sun is
 23 again complaining about methodology. Mr. Paulson’s research is a viable way to
 24 quantify the source of the printed *Sun*’s news stories, which is helpful to the trier
 25 of fact in determining whether the Sun’s printed quality has fallen below the
 26 standards set in the 2005 JOA. The Sun’s critiques of Mr. Paulson’s methodology
 27 are best saved for trial. *See Kennedy*, 161 F.3d at 1231 (holding that faults in
 28 methodology typically go to evidence’s weight, not its admissibility).

1 Second, Mr. Paulson has good reasons to conflate the Sun’s staff writers
 2 with the writers of other GMG publications. GMG considers writers from all its
 3 publications to be part of “a single newsroom, generating content for all [its]
 4 properties.” (ECF No. 863-1 at 13-14.) The Sun also shares staff with many of
 5 GMG’s other publications, including its managing editor, chief operating officer,
 6 and several of its content contributors. (ECF No. 939 at 17-18.) The print Sun
 7 has also published articles originally written for other GMG publications, (*Id.* at
 8 19; ECF No. 939-14 at 3:5-4:2), and GMG pays all its publications’ writers from
 9 the same bank account (ECF No. 939-13 at 3:12-24).

10 **c. Possibility of Replication**

11 *Daubert* requires that an expert’s methodology be “testable.” *Daubert*, 509
 12 U.S. at 593. A crucial factor in a study’s testability is whether it can be replicated.
 13 *See, e.g. City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1047 (9th Cir. 2014).
 14 That is, a study’s methods are not “reliable” if a different researcher, imitating
 15 the processes described in the study, could reach a substantially different result.
 16 *Id.* (“Under *Daubert*’s testability factor, the primary requirement is that [s]omeone
 17 else using the same data and methods . . . be able to replicate the result[s].”).

18 The Sun argues that Mr. Paulson’s study is not replicable because Mr.
 19 Paulson does not provide a copy of one of the data sets on which he relies: his
 20 sample of the Sun’s online publications. The Sun argues that it cannot replicate
 21 Mr. Paulson’s results if it does not know which stories he analyzed to reach those
 22 results.

23 Mr. Paulson’s research is replicable. He describes his method for collecting
 24 stories from the LasVegasSun.com and the printed *Sun* on pages 21-22 of his
 25 report. (ECF No. 863-1 at 22-23.) The method is relatively simple, employing a
 26 random number generator across “constructed weeks” of Sun stories to better
 27 capture the non-normal distribution of stories in a given week. (*Id.*) It is true that
 28 Mr. Paulson does not preserve the actual data set from which he draws his

1 conclusions, but he provides enough information for any other researcher to
 2 create a statistically similar data set using the archived stories on the Sun's
 3 website. *See, e.g., April 3, 2019, Las Vegas Sun,*
 4 <https://lasvegassun.com/news/2019/apr/03/> (last visited, March 30, 2024).

5 The Sun can apply the same data collection tools to the same pool of data,
 6 develop a comparable data set, and apply identical analyses. Mr. Paulson's
 7 research is replicable. *See also U.S. v. Romano*, 794 F.3d 317, 333 (2d Cir. 2015)
 8 (holding that an expert's testimony was replicable even when the description of
 9 some of his methodology was "less-than-clear," and it was based in part on his
 10 non-replicable experience as a coin collector).

11 **d. Generally Accepted Methods of Measuring Quality**

12 The Sun next argues that Mr. Paulson's testimony is inadmissible because
 13 it attempts to measure an entirely subjective characteristic, quality, and applies
 14 no generally accepted methods for measuring that characteristic.

15 *Daubert* requires experts to apply methods that are "generally accepted in
 16 the scientific community." *Daubert*, 509 U.S. at 593.

17 Mr. Paulson employs two metrics, which he argues are strong objective
 18 indicators of newspaper quality: proximity and timeliness. (See ECF No. 863-1 at
 19 15.) He cites several studies that corroborate the importance of these metrics in
 20 measuring newspaper quality. (*Id.* at 14-19.)

21 The Sun's complaints that Mr. Paulson failed to use *different* metrics are
 22 insufficient to bar his testimony on these grounds.

23 **e. Relevance to the RJ's Section 2 Claims**

24 The parties also disagree about whether Mr. Paulson's testimony can be
 25 used to demonstrate a reduction in output in the relevant market under the RJ's
 26 Sherman § 2 claims. The Court dismisses those claims in its order on the Sun's
 27 motion for summary judgment (ECF No. 836), so this issue is moot.

28 **2. Legal Conclusions and Testimony on Intent**

1 The Sun next argues that the Court should bar any aspect of Mr. Paulson’s
2 testimony that interprets provisions of the 2005 JOA, makes a conclusion about
3 whether the Sun breached the 2005 JOA, or opines on the Sun’s intent to degrade
4 the quality of the printed *Sun*. The Court agrees that Mr. Paulson may not testify
5 on any of the above subjects.

6 Expert testimony “cannot be used to provide legal meaning or interpret
7 [contracts] as written.” *McHugh v. United Service Auto. Ass’n*, 164 F.3d 451, 454
8 (9th Cir. 1999). Likewise, “an expert cannot testify to a matter of law amounting
9 to a legal conclusion.” *U.S. v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015). But
10 experts can testify to the existence of an industry standard and opine on whether
11 a party has met that standard. *Hangerter v. Provident Life and Acc. Ins. Co.*, 373
12 F.3d 998, 1016 (9th Cir. 2004) (holding admissible an expert’s testimony that
13 defendants deviated from industry standards, even though that conclusion
14 supported a finding of bad faith, which was an issue reserved for the finder of
15 fact).

16 In its Order on the Sun’s motion for summary judgment, the Court
17 determined that the quality provision in § 5.2 of the 2005 JOA is ambiguous. At
18 trial, Mr. Paulson may not testify on the meaning of any provision of the 2005
19 JOA. He may testify on the editorial quality standards in the U.S. metropolitan
20 daily news industry. The Court interprets the challenged portions of Mr.
21 Paulson’s report as speaking only to that issue. (*See, e.g.*, ECF No. 863-1 at 24
22 (“[o]ne widely embraced measure of a newspaper’s quality is how much of its
23 content is generated by its own staff and what percentage is simply bought from
24 other services.”).) Mr. Paulson also may testify as to his findings about the Sun’s
25 quality using his objective indicators of newspaper quality. *See Hangerter*, 373
26 F.3d at 1016. He may not testify on whether the Sun breached any provision of
27 the 2005 JOA. His opinion that the Sun is “in clear violation of the 2005
28 agreement” is therefore inadmissible. (ECF No. 863-1 at 14.)

Finally, the Sun is correct that Mr. Paulson occasionally impermissibly opines on the Sun’s state of mind. “[E]xpert testimony is inadmissible when it addresses lay matters which a jury is capable of understanding and deciding without the expert’s help.” *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, 613 F. Supp. 3d 1308, 1322 (S.D. Cal. 2020), *aff’d*, 9 F.4th 1102 (9th Cir. 2021) (citing *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989); *see also* Fed. R. Evid. 702(a). Juries are capable of determining an actor’s state of mind, and courts “routinely exclude . . . expert testimony as to intent, motive, or state of mind.” *Siring v. Oregon State Bd. of Higher Educ. Ex rel. E. Oregon Univ.*, 927 F. Supp. 2d 1069, 1077 (D. Or. 2013) (collecting cases).

The Court has identified several impermissible conclusions related to the Sun’s intent. (ECF No. 863-1 at 21 (“79 percent of the content created by the *Sun* staff was *intentionally* excluded from the Sun print paper”) (emphasis added), 22 (“[t]he Sun’s refusal to publish [local news stories] is inexplicable and *intentional*” (emphasis added), 28 (“[the Sun’s failure to publish recent news] isn’t journalistic negligence. It’s . . . an *intentional* delaying of the news”) (emphasis added), 60 (“the *Sun* has *intentionally* withheld local news, abandoned principles of timeliness, shifted its focus away from Las Vegas, [etc.]”) (emphasis added); ECF No. 863-2 at 2 (“[the Sun] *intentionally* withholds most of this content from the print Sun”) (emphasis added), 41 (“the Sun’s historical practice of delaying publication of news appears to be part of an *intentional* strategy to shortchange readers”) (emphasis added). Any testimony by Mr. Paulson suggesting the Sun’s intent, motive, or state of mind is inadmissible.

III. CONCLUSION

It is therefore ordered that Defendants’ Objection (ECF Nos. 751, 752) to Judge Ferenbach’s protective orders (ECF No. 742) is overruled.

It is further ordered that the RJ’s motion to file a reply to the above mentioned objection (ECF No. 772) is granted.

1 It is further ordered that Defendants' Objection (ECF Nos. 819/820) to
2 Judge Ferenbach's order barring reliance on the Stephens LoI (ECF No. 818) is
3 overruled.

4 It is further ordered that the Sun's motion to exclude the testimony of
5 Kenneth Paulson (ECF Nos. 897/898) is granted in part and denied in part, as
6 detailed above.

7
8
9 Dated this 31st day of March 2024.

10
11 
12

13 ANNE R. TRAUM
14 UNITED STATES DISTRICT JUDGE
15
16
17
18
19
20
21
22
23
24
25
26
27
28